88-51

No. .....

In The
Supreme Court of the United States
October Term, 1987

—o—

JAMES E MALLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether a federal criminal defendant charged with a violation of 18 U.S.C. 1001 in "willfully and knowingly" failing to list "accommodation loans" on a Federal Deposit Insurance Corporation questionnaire filled out by him as a president of a state chartered bank is denied due process of law within the meaning of *In Re Winship,* 397 U.S. 358, 364 in the District Court's failure to define "accommodation loan," a legal issue, for the jury?

2. Whether a federal criminal jury can make a key factual resolution whether a federal criminal defendant committed a federal crime under 18 U.S.C. 1001 unless and until the District Judge instructs on the legal meaning of the phrase describing the crime allegedly committed here, failure of a state bank president to list "accommodation loans" on a FDIC questionnaire?

3. Whether a key element of a criminal charge under 18 U.S.C. 1014 was omitted from the indictment in Count I and was thus not presented to the federal criminal defendant, Petitioner herein, to enable him to defend and meet the charges, causing the District Judge to set aside the conviction under Count I within the meaning of *Williams v. United States,* 458 U.S. 279, 284 (1982).

4. Whether the United States Court of Appeals for the Eighth Circuit erred in reinstating Count I of the charges after dismissal by the District Court?

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OTHER AUTHORITIES

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

James E. Mallen, Petitioner, seeks a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit from the ruling entered April 14, 1988, rehearing denied May 10, 1988.

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OPINION BELOW

The United States Court of Appeals for the Eighth Circuit entered its opinion, *United States v. Mallen,* 843 F. 2d 1096 (8th Cir. 1988), on April 14, 1988.

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PETITION FOR REHEARING/SUGGESTION FOR HEARING EN BANC

By a timely filed petition for Rehearing/Suggestion for Hearing En Banc, Petitioner sought reconsideration of the panel decision of U.S. Circuit Judges Gibson, Bowman, and Wollman. Denial was entered May 10, 1988.

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JURISDICTIONAL GROUNDS

(i) The United States Court of Appeals for the 8th Circuit entered judgment on April 14, 1988 in *United States v. Mallen,* 843 F.2d 1096 (8th Cir. 1988); a copy of that opinion is set forth in Appendix A.

(ii) A Petition for Rehearing/Suggestion for Hearing En Banc was made, and was denied on May 10, 1988. A copy of that Denial is set forth in Appendix B.

(iii) Jurisdiction to review by Certiorari a decision of a United States Circuit Court in a criminal case is provided under 28 U.S.C. 1254.

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U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

UNITED STATES STATUTES INVOLVED

United States Code Sections 18 U.S.C. 1001, 18 U.S.C. 1014, are herewith involved and are set forth in Appendix C.

STATEMENT OF THE CASE

On December 10, 1986, a two count indictment was filed in the United States District Court for the Northern District of Iowa. The Petitioner James E. Mallen was arraigned on December 22, 1987 and pleaded not guilty. The indictment contained two counts. Count One charged a violation of 18 U.S.C. 1014 by making a false statement in an individual financial statement filed with the Farm-

ers State Bank of Kanawha, Iowa, for the purpose of influencing the Federal Deposit Insurance Corporation. Count Two charged a violation of 18 U.S.C. 1001 by making a false statement in an answer to a bank's questionnaire submitted by the Federal Deposit Insurance Corporation.

On March 24, 1987, a jury returned a verdict in which the Petitioner was convicted on both counts. However, on May 1, 1987, the trial court pursuant to its own motion dismissed Count One of the indictment.

On May 1, 1987, the Petitioner James E. Mallen was sentenced to imprisonment for a term of three years, with the execution of all but sixty days of the sentence suspended. The Petitioner was also sentenced to pay a fine of Ten Thousand Dollars. On May 5, 1987 the Petitioner James E. Mallen appealed his conviction to the Court of Appeals for the Eighth Circuit, which affirmed his conviction of Count Two and reinstated his conviction on Count I on April 14, 1988.

The Indictment

On December 10, 1986, an indictment was returned by a federal grand jury naming James E. Mallen as defendant. The indictment contained two counts. Count One charged that James E. Mallen knowingly made a material false statement in an "individual financial statement" submitted to the Farmers State Bank, Kanawha, Iowa, for the purpose of influencing the action of the Federal Deposit Insurance Corporation (FDIC) in that Petitioner failed to disclose an interest in a limited partnership known as Elmwood Limited Partnership, a violation of 18 U.S.C. 1014.

Count Two charged that James E. Mallen willfully and knowingly made a false statement, in that in an "officer's

questionnaire" form, FDIC, Petitioner did not disclose an *"accommodation loan"* in the name of Carl Martin, dated November 13, 1981, *"Accommodation loans"* in the names of William Dahl, Carl Martin and Robert and William Shipman, dated February 26, 1982, and an *"accommodation loan"* in the name of Robert and William Shipman, dated May 17, 1982, all made by the Farmers State Bank, when in fact such *"accommodation loans"* had been made, in violation of 18 U.S.C. 1001.

The Overview

The Petitioner, James E. Mallen, was President of the Farmers State Bank of Kanawha, Iowa. Mr. Mallen and four other members of the Board of Directors of the bank, sometime in 1980, became limited partners in Elmwood Limited Partnership, a firm that had made investments in real estate, primarily apartment buildings. The bank made no loans to Elmwood Limited Partnership. From time to time the bank made loans to William Dahl, Carl Martin and Robert and William Shipman, regular borrowing customers of the bank, and also limited partners in Elmwood Limited Partnership. The proceeds of the loans to Dahl, Martin and the Shipmans specified in Count Two of the indictment were in turn loaned to or invested in or used in a manner that benefited Elmwood Limited Partnership, by Dahl, Martin and the Shipmans.

The offenses charged in the indictment stem from the relationships of the various parties beginning with the formation of Elmwood Limited Partnership in 1980. Count One charges that Mallen failed to show an interest in Elmwood Limited Partnership as an asset on a financial statement filed January 15, 1982, with the bank. Count One was dismissed by the trial court after a jury verdict had found the Petitioner guilty. The United States cross-

appealed from the trial court's order dismissing Count One. The gist of the offense charged in Count Two of the indictment is that FDIC form, "officer's questionnaire," required the reporting of "*accommodation loans;*" that the loans to Dahl, Martin and the Shipmans were "*accommodation loans;*" and that the Petitioner falsely responded to the "officer's questionnaire" in that Petitioner, knowing these loans to be "*accommodation loans*" willfully and knowingly failed to disclose the loans to Dahl, Martin and the Shipmans.

BASIS OF ORIGINAL FEDERAL JURISDICTION

Federal jurisdiction of the United States District Court Northern District of Iowa, was invoked by charging Petitioner with violations of United States Criminal statutes 18 U.S.C. 1001 and 18 U.S.C. 1014.

ARGUMENT I

PETITIONER WAS DEPRIVED DUE PROCESS OF LAW WITHIN THE MEANING OF IN RE WINSHIP, 397 U.S. 358, 364 IN THE FAILURE OF THE DISTRICT COURT TO DEFINE FOR THE JURY THE LEGAL CONCEPT AND MEANING OF AN "ACCOMMODATION LOAN," OR A "LOAN MADE FOR THE ACCOMMODATION OF OTHERS;" THIS IS FULLY AN ISSUE OF LAW, AND NOT AN ISSUE OF FACT FOR THE RESOLUTION BY A LAY JURY. EACH ELEMENT OF A FEDERAL CRIME MUST BE PROVEN BEYOND A REASONABLE DOUBT AND COUNT II OF THE INDICTMENT SPECIFICALLY ADDRESSED AND ALLEGED THAT PETITIONER "DID NOT DISCLOSE AN ACCOMMODATION LOAN" OR "ACCOMMODATION LOANS"

MADE TO VARIOUS INDIVIDUALS; THE COURT FAILED TO DEFINE WHAT AN "ACCOMMODATION LOAN" WAS, DISENABLING THE JURY FROM EVER FACTUALLY DETERMINING WHETHER PETITIONER WILLFULLY AND KNOWINGLY FALSIFIED A DOCUMENT OR CONCEALED A MATERIAL FACT WITHIN 18 U.S.C. 1001, BY FAILING TO LIST "ACCOMMODATION LOANS."

Petitioner asserts that the term "*accommodation loan*" or "*loan made for the accommodation of another*" is a *legal term* or *legal concept* and thus must be defined for the lay jury before that lay jury can make the factual determination whether Petitioner "willfully and knowingly" failed to disclose that he, as President of the Farmers State Bank of Kanawha, Iowa, had made such loans to various individuals named in the indictment and had "willfully and knowingly" failed to list them on the FDIC questionnaire. As such legal concept or issue of law, it is *not* subject to proof by "expert witness" testimony, but must be instructed upon by the District Judge.

As we shall see below, the District Judge recognized at one time his need to define and instruct upon this key concept, but then mysteriously and inexplicably failed to do so.

We begin at the indictment. Count II charged:

> "On or about November 22, 1982, in the Northern District of Iowa, James E. Mallen, in a matter within the jurisdiction of the Federal Deposit Insurance Corporation of the United States, willfully and knowingly did falsify, conceal, and cover up by trick, scheme or device a material fact, and did make a materially false, fictitious or fraudulent statement or representation, and did make and use a false writing or document knowing the same to contain a materially false, fictitious or fraudulent statement or entry, in

that in an Officer's Questionnaire, No. 13152-1, Form FDIC 6300/34 (6-82) Defendant did not disclose an *accommodation loan* in the name of Carl Martin, dated November 13, 1981; *accommodation loans* in the name of William Dahl, Carl Martin and Robert and William Shipman, dated February 26, 1982; an *accommodation loan* in the name of Robert and William Shipman, dated May 17, 1982, all made by the Farmers State Bank, Kanawha, Iowa, when in fact such *accommodation loans* had been made.

'This is in violation of 18 United States Code Section 1001.' "

It is clear, therefore, that the very charges made against Petitioner, which must be proven beyond a reasonable doubt, alleged in no less than three places that Petitioner "did not disclose *accommodation loans*" . . . . when in fact such *accommodation loans* had been made. (See R.T.A. 15, line 16 - R.T.A. 16, line 16; see Appendix D of this Petition).

Plainly, an "*accommodation loan*" is a term of *legal* import and thus not subject to the *factual* determination of what it means by a lay jury gleaning the basis for their *factual* resolution from "expert" witnesses at the trial, but it is solely the function of the District Judge to define the term via jury instructions.

It is evident that the government sought to create its own meaning to the term via an "expert," FDIC examiner Bruce Holmgren, who was questioned in a *leading* manner by the assistant U.S. Attorney; From R.T.A. 393, line 7:

Q From your experience—start over.

On Exhibit 2 there is a question number 5 which says, "List all extensions of credit made since last examination for the *accommodation of others* than those whose names appear on the bank's records or on credit instruments in

connection with such extensions." What's the significance of that question? Why is that question there?

A We have a need to know who the ultimate benefactor is of the loan proceeds for a couple of reasons: One is to assess the ability and willingness of the borrower to repay; the second being for the application of state lending limits in the case of Farmers State Bank.

Q How would that type of information affect the application of state lending limits?

A The state lending limits define the obligations of a *borrowing customer* of the bank to include loans to others for the benefit of that person, and state banks are authorized to only lend a certain percentage of their capital to any one customer.

Thus the prosecutor recognized that no legal definition existed for the term "*accommodation loan*" as charged in the indictment, and he sought to develop it from his witness to fit a government theory of the case.

Constitutionally speaking, this creates a void for vagueness as applied error in the case of the government, for the government never presented any *legal* meaning to the term "*accommodation loan,*" nor did the Court instruct on it.

On cross examination at R.T.A. 459, line 17, Holmgren testified as follows:

Q (By Mr. Rosenberg) The term "*accommodation loan,*" does that appear in any definition of the FDIC that is furnished to bankers for the purpose of defining what an *accommodation loan* is?

A. I don't believe so.

Q. Now, the purpose of that question, as I understand it, is to determine whether there are lending limit violations under the state law; is that correct?

A That's one of the purposes.

Q And the other purpose is what?

A To assessing the risk diversification as far as quality and repayment source and ability.

Q Now, from time to time you've referred to some of these loans as *accommodation loans,* have you not? *(emphasis supplied)*

A I believe I have.

Q If I wanted to determine the meaning of an *accommodation loan,* where would I look? *(emphasis supplied)*

A I'd probably look in the dictionary for a definition of *accommodation.*

Thus Holmgren, the FDIC "Expert," could not, and did not define or opine on the definition of "*accommodation loan,*" save to suggest looking up the word "*accommodation*" in the dictionary.

The latter raises the spectre that the 12 jurors individually sought instruction from the dictionary allowing potentially 12 different interpretations, a violation of the requirement that all evidence be produced by sworn testimony from the stand, or they did nothing, leaving the entire trial void of instruction as to the legal meaning of "*accommodation loan.*"

Finally Holmgren noted the absence of illumination on the definition and legal meaning of "accommodation loan" in the Iowa State Code; from R.T.A. 473, line 7:

Q One other question on this before I get into another matter. You're familiar with the state law with respect to banking practices in the State of Iowa, are you not?

A I believe I was generally familiar with the Banking Act.

Q If a person were to go to the State Banking Code, would he find the term "*accommodation loan,*" quote, accommodation loan, end quote, in that code?

MR. TEIG: Your Honor, my objection would be this would be *a matter of law which would be up to the Court,* not to the witnesses.

MR. ROSENBERG: I'm not asking I don't believe as a matter of interpretation of law.

THE COURT: As I was considering the objection, that was the thought I had. He's not asking him what the law was, whether or not it could be found there. The objection will be overruled. I believe the—keeping in mind it's been a long time since I've used the Iowa Banking Act as a normal everyday tool in my profession, I believe the term is used for use in benefit of, or something of that nature, rather than accommodation.

Q (By Mr. Rosenberg) Yeah, but my question was, quote, accommodation loan, end quote, is that a term that we could find in the Iowa Banking Statute?

MR. TEIG: Your Honor, the other objection I would have, this is not relevant or material, in that Exhibit 2, question 5, does not use the term, quote, accommodation loan.

THE COURT: The objection is overruled.

A I do not know if the term "*accommodation loan*" is found in the Iowa Banking Act.

Q (By Mr. Rosenberg) So it's not in the Banking Act, as far as you know?

A As far as I recall.

Q And it's not in any of your regulations of the FDIC, that you can recall; is that correct?

A I don't believe I testified to that. I think I answered in response to your question of do we provide a manual or pamphlet to guide the completion of this particular questionnaire, and I said no.

Q Are there—are there federal, federal regulations that use the term "accommodation loan," other than that which appears in the banking examiners' handbook?

A At this point in time, I can't think of a regulation that contains that term in it.

Thus *neither* Iowa State Banking Act Codes nor FDIC regulations defined "*accommodation loan,*" and neither did the District Court in the jury instructions; yet the government was pressing criminal charges that Petitioner "knowingly and willfully" failed to list *three separate "accommodation loans"* on the FDIC questionnaire.

That it becomes necessary to define "accommodation loan" was recognized by the District Judge; at R.T.A. 535, line 4:

THE COURT: Well, I'm going to let you proceed. Mr. Holmgren was permitted to indicate what type of loans should have been listed in response to question 5. I'm not sure he defined accommodation loan in his testimony. I don't think he was asked. I'm not sure I'm going to need to define that term for this jury. I've not yet made a decision about that. The term doesn't appear in Exhibit 2, although it does appear in the Government's indictment, and that may be the reason why I will have to define it, but I think that definition is a matter of law as opposed to a matter of fact that has to be proved. *I think it's a question for me to instruct the jury as to what the definition of the term is.* Whether or not these transactions fit that definition is then a matter of looking at the facts surrounding the transactions and determining whether or not they fit the legal definition of an accommodation loan. I'm going to let you proceed with this witness—there are some bounds to relevancy.

In a motion for acquittal on Count 2 following the conclusion of the government's case, counsel for Petitioner argued at R.T.A., 510, line 15:

With respect to Count 2, the Government has failed to establish that there was a clear and convincing—clear understanding, excuse me, strike that, a clear meaning such as the Court can presume or from which a jury could find that the term "*accommodation loan*" was so clearly and unequivocally understood by the Defendant that any response to that question could be—that did not include loans determined by the banking examiners to be accommodation were false or knowingly false. I've kind of wandered around in that one. Let me see if I can make it more precise.

I think the Government has a burden of showing that an *accommodation loan,* as used in their indictment, has such a clear and general understanding that all persons who are asked to deal with that term in response to a ques-

tion must have understood its meaning, and I believe the evidence falls far short of that. I think the term "*accommodation loan*" appears in the indictment, and that's what's charged. My understanding that the term in the present state of the record is not defined in the regulations of the FDIC, nor is there any evidence to show that it's defined in the state law or any other ascertainable definition was available to the author of the statement that appears in the questionnaire, number 5. Having failed to establish that criteria, the jury could not conclude beyond a reasonable doubt that at the time Mr. Mallen signed that questionnaire he understood it in the same way that the bank examiners are now interpreting it.

That's in substance the motion for judgment of acquittal.

THE COURT: Thank you, sir.

The prosecutor replied at R.T.A. 513, line 13:

As to Count 2, again I stress to the Court that the form the Defendant is accused of falsifying does not use the term "*accommodation loans.*" It says for the accommodation of others than those names are listed on the credit instruments. And as Mr. Holmgren said, all you have to do is look in the dictionary to figure that out. Defendant has been a banker for years and years, never expressed any difficulty with that particular question to Mr. Holmgren, saying he didn't understand it, didn't understand the plain English. Most telling is on that very same form he did list one *accommodation loan* to Mr. DeWaard for the benefit of Kanawha Sand and Gravel. Basically that transaction was basically the same as Elmwood's, with a very limited distinction. Kanawha Sand and Gravel did have borrowings in its own name, a distinction, but no difference.

Based on these observations, the Court denied the motion to acquit.

The error took on constitutional significance because the key term was never to be instructed upon by the Court but proceeded solely by witness testimony, an aberration,

where a legal definition is necessary from the District Judge.

1. James Veldhouse, Vice President of the Farmers State Bank, the officer directly under Petitioner, testified that he personally had filled out the FDIC questionnaire for Petitioner; essentially Veldhouse distinguished an "accommodation loan" as requiring the beneficiary of it to *also* be a borrowing customer from the bank; that was why the Gerritt DeWaard-Kanawha Sand and Gravel loan was listed as an "accommodation loan" and the Elmwood partnership loans were not, Elmwood not being a borrowing customer of the bank, and, in addition, the bank immediately selling the loans without recourse to the Norwest Bank of Des Moines. From R.T.A. 564, line 16:

Q (By Mr. Rosenberg) I draw your attention to question 5 of Exhibit 2 of the Officer's Questionnaire, and ask you who filled that out?

A I did.

Q And where did you obtain the information from which you filled it out?

A From my own knowledge of the affairs of the bank.

Q There appears in answer to Exhibit 5 (sic) a statement with respect to Gerrit DeWaard for Kanawha Sand and Gravel, Inc., does there not?

A Yes.

Q And what was that in response to?

A Well, that is a loan that we had on the books to Gerrit DeWaard.

Q And why did you include that in Exhibit 5?

A Because it was a loan made for his interest in a company he had there, Kanawha Sand and Gravel. The loan went for their use.

Q Was the Kanawha Sand and Gravel, Inc. indebted to the bank at the time the loan to Mr. DeWaard was made?

A Yes.

Q Was Mr. DeWaard indebted to the bank?

A Yes, I believe so.

Q Did you know what the purpose of Mr. DeWaard's loan from the bank was?

A This particular one?

Q Yes.

A It was for—the money was used by Kanawha Sand and Gravel.

Q Did you consider that to be an *accommodation loan*?

A Yes.

Q And explain to me why that was an *accommodation loan*?

A Well, Kanawha Sand couldn't borrow any more on its own because it had—it was either at or very near the legal lending limit to one individual, one company for our sized bank, and so Gerrit DeWaard borrowed money with his own collateral, and—but because the money was used by Kanawha Sand and Gravel it was an accommodation to them.

Q Are you familiar with the meaning of the term "concentration of loans"?

A Yes.

Q And what did you understand that to mean at that time?

A Well, a concentration of loans is when several borrowers or more than one at least have a common business or related interest.

Q At the time you filled out question 5 of the Officer's Questionnaire, Exhibit 2, were you aware of certain loans to Mr. Dahl, Mr. Shipman and Mr. Martin in the amount of $110,000?

A Yes.

Q What did you know about those loans at the time you filled out the questionnaire?

A Well, I knew that they were loans that we had made and sold to Iowa-Des Moines. They were loans that they had requested and we had called up our correspondent officer at Iowa-Des Moines and asked him if he would buy them from us, so the loans were made.

Q Did you know the purpose for which those loans were made?

A Yes.

Q And what was your understanding of the purpose of those loans?

A Well, they were used to pay Cletus Hejlik for an indebtedness he had with our bank.

Q Okay. At the time you filled out questionnaire 5, did you believe that those were accommodation loans?

A No.

Q Did you believe that you were required to list those loans under paragraph 5?

A No.

Q Would you tell us the basis of that, please?

A Well, the loans with Dahl, Martin and Shipman, these individuals were in a limited partnership called Elmwood Limited Partnership, and—so was Cletus Hejlik, for that matter, but *Elmwood Limited Partnership had no loans with our bank.* (emphasis supplied)

Q Can you tell us what you considered to be the difference between those loans and the loans to Gerrit DeWaard?

A *Gerrit DeWaard's loan was for Kanawha Sand and Gravel, a borrowing customer of our bank. Elmwood Limited Partnership had no borrowings at our bank.* (emphasis supplied)

2. Petitioner Mallen, President of the Farmers State Bank, and the signatory on the FDIC questionnaire, testified as to his understanding of "accommodation loans."

The key difference which earmarked an *"accommodation loan"* was whether the *beneficiary* of it was also a borrower of the bank; Gerritt DeWaard, in borrowing money for the benefit of Kanawha Sand and Gravel, obtained an *"accommodation loan"* since Kanawha Sand and Gravel was also a *borrower of the bank;* loans made to Martin, the Shipman brothers, and Dahl for the ultimate benefit of Elmwood were *not "accommodation loans"* since Elmwood was *never* a borrower from the bank. Petitioner testified, inter alia, at R.T.A. 885, line 15:

Q Mr. Mallen, I've asked you earlier to examine Exhibit 2, the Officer's Questionnaire. At this time I'd ask you to look at question number 5 and tell me what was your understanding of the purpose for which that question was asked?

A To determine at the time an examination was being done as to whether there were any loans at the bank which would create a violation because of an excess loan.

Q What is an excess loan violation usually referred to in the banking industry?

A An excess loan is a loan where you've exceeded the bank—the bank has exceeded its lending limits to a customer.

Q What was your understanding at the time as to how the matter of whether or not the lending limits are exceeded was arrived at?

A Well, the lending limit is determined by the capital and surplus of the bank, and the lending limit to any one customer is 20 percent of capital in surplus. In our case it was 160,000.

Q How would you determine whether a borrower exceeded your lending limit?

A To look at the loans or—that he had or he or she or the entity had in their name on the bank's books.

Q *What relevancy would the question contained in the* Officer's Questionnaire, number 5, have to determining those loan limits?

A If you have other loans on the books that are in someone else's name, *the proceeds of which go to benefit another borrowing customer of the bank*, you would have to include those.

Further, at R.T.A. 888, line 1:

Q Prior to late November of 1982, had you had any discussions with any representatives of the Federal Deposit Insurance Corporation with respect to the initial $50,000 investments of the various limited partners?

A Yes.

Q Were those shown as *accommodation loans*?

A No.

Q Did the—anybody from the FDIC tell you they were *accommodation loans*?

A No.

Q So far as you know, have they ever claimed they were *accommodation loans*?

A No.

Q On February 26, 1982, Mr. Dahl, Mr. Martin and Mr. Shipman each borrowed $110,000 from the bank, according to the testimony. Are you familiar with the testimony?

A Yes.

Q Do you recall those loans?

A Yes.

Q At the time you filled out the Officer's Questionnaire number 5, were you aware of those loans?

A Yes.

Q Why were they not included under the answer to the fifth question?

A They had been sold a hundred percent participation to Norwest, and I did not—*plus the fact that I did not consider them to be accommodation loans.*

Q For what reason?

A *We had no loans with Elmwood.* The loans were a hundred percent sold to Norwest without recourse, and

the individuals who borrowed the money gained some benefit from the loan.

And at R.T.A. 893, line 21:

Q *Was Elmwood Limited Partnership a borrowing customer of the Farmers State Bank?*

A *No.*

Finally, at R.T.A. 895, lines 5-18:

Q *There appears an item in response to question 5 in the questionnaire pertaining to Kanawha Sand and Gravel; is that correct?*

A Yes.

Q How did you understand that to be different than the loans we've just been talking about?

A *We had a line of credit with Kanawha Sand and Gravel, and Gerrit DeWaard, an individual, borrowed money in his name and injected it into Kanawha Sand and Gravel, who were a borrowing customer of our bank.*

Q *And how did that make it different?*

A *For the purposes of determining whether you had an excess loan, the loan to Gerrit DeWaard had to be included in the—in the totals.*

3. Importantly, even FDIC's Bruce Holmgren testified under oath that the *beneficiary* of the "accommodation loan" had to be a *borrower* of the bank; at R.T.A. 393, line 19:

"Q How would that type of information affect the application of stable lending limits?

A The state lending limits define the obligations of a *borrowing* customer of the bank to include loans to others for the benefit of *that person*, (i.e. the *borrowing* customer), and state banks are authorized to only lend a certain percentage of their capital to any one customer."

Thus it appears clear beyond any challenge that the trial was characterized by ambiguities or conflicts from *witnesses* over the meaning and definition of a *legal con-*

cept key to the resolution of the case: what is an "*accommodation loan?*"

Petitioner asserts that the United States could not constitutionally try him for a major federal crime under 18 U.S.C. 1001 in "willfully and knowingly" failing to list "*accommodation loans*" in Count 2 unless the District Judge defined the legal term and concept; it cannot be done by either lay or "expert" witnesses in the matter of trial testimony, then leaving the lay jury to determine from whence lies the "truth"; only if the concept were first defined as a matter of law could the jury resolve the factual issue whether Petitioner "willfully and knowingly" failed to list the "*accommodation loans*" on the FDIC questionnaire.

The Court only instructed in the general elements of the charge, omitting any reference to a definition of "*accommodation loan.*"

The court instructed (Instruction No. 6) that the elements of the offense charged in Count Two of the Indictment were as follows:

> Three essential elements are required to be proved in order to establish the offense charged in Count 2 of the Indictment.
>
> *First*, that the defendant falsified, concealed or covered up a material fact by some trick, scheme or device or made a false, fictitious or fraudulent statement or representation, or made or used a false writing or document in relation to a material matter within the jurisdiction of a department or agency of the United States;
>
> *Second*, that the defendant did such act or acts with knowledge of the concealment or falsity; and
>
> *Third*, that the defendant did such act or acts willfully.

In Instruction No. 7 the court instructing on the Defendant's theory of defense to Count Two stated:

> A statement, entry or document made out of an honest mistake or in the good faith belief that the statement, entry or document is in fact true or correct when made is not a "false," "fictitious," or "fraudulent" statement, entry or document.
>
> When determining whether the defendant knew a particular statement was false or omitted facts that he was duty bound to reveal, you must look to what the defendant intended the statement to mean or, in the case of an omission or concealment, how the defendant interpreted the request for information. So long as defendant honestly and in good faith believed his representations were true or his response to an inquiry was accurate and complete, then he has not knowingly made a false statement. Included in the government's burden to prove that the defendant acted knowingly and willfully is the burden to negate the defendant's claim that he in good faith, or out of mistake, carelessness, or inadvertence, believed . . . answer to question 5 of the Officer's Questionnaire were true, correct, and complete when made.

The elements of the offense specified in the instructions when considered with the Indictment and Petitioner's theory of defense required the government to prove beyond a reasonable doubt that the Petitioner failed to disclose certain *"Accomodation Loans"* in answering Question 5 of the officer's questionnaire. The government was required to prove beyond a reasonable doubt that the failure to disclose the named *"accomodation loans"* was "willful" and "knowing". Further, the government was required to look to how the Petitioner interpreted the request for information and to negate the Petitioner's honest and good faith belief in the representation he made. By offering an interpretation of the question that is at least

as reasonable as the government's, the Petitioner puts into issue the sufficiency of the essential elements of the offense. *United States v. Bell,* 623 F.2d 1132 (5th Cir. 1980).

In *Williams v. United States,* 458 US 279, 73 L Ed 2d 776, 102 S Ct 3088 at 290 this Honorable Court noted the Federal constitutional problem where a statute is ambiguous; in the case at bar the charges were so ambiguous as to not being *defined* by any recognized code, nor were they defined by the District Judge:

Given this background—a statute that is not unambiguous in its terms and that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law—we believe that a narrow interpretation of § 1014 would be consistent with our usual approach to the construction of criminal statutes. The Court has emphasized that " 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' " *United States v Bass,* 404 US 336, 347, 30 L Ed 2d 488, 92 S Ct 515 (1971), quoting *United States v Universal C.I.T. Credit Corp.* 344 US 218, 221-222, 97 L Ed 260, 73 S Ct 227 (1952).[13] To be sure, the rule of lenity does not give courts license to disregard otherwise applicable enactments. But in a case such as this one, where both readings of § 1014 are plausible, "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the" deposit of bad checks. *United States v Enmons,* 410 US, at 411, 35 L Ed 2d 379, 93 S Ct 1007.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

See also *United States v. Bass*, 404 U.S. 336, 347-350 re ambiguity.

As such, the charge suffers from a constitutional defect of void for vagueness as applied, and the conviction must be reversed.

———o———

ARGUMENT II

PETITIONER WAS DENIED DUE PROCESS OF LAW BY FAILURE OF THE INDICTMENT TO SET FORTH A NECESSARY ELEMENT OF THE CHARGE UNDER 18 U.S.C. 1014; THE DISTRICT COURT CORRECTLY DISMISSED COUNT I FOLLOWING CONVICTION BY THE JURY AND THE COURT OF APPEAL WRONGLY REINSTATED IT UNDER CIRCUMSTANCES WHICH DISENABLED PETITIONER FROM REFUTING THE NON-EVIDENTIARY SUPPORTED REASONS OF THE COURT OF APPEALS.

On April 22, 1987, following Petitioner's conviction on Count I, a violation of 18 U.S.C. 1014, the District Court, sua sponte, ordered counsel to respond to a belief of the Court that Count I of the indictment was insufficient. See Appendix E which sets forth the Order in toto. The Court eventually dismissed Count I, under authority of *Williams v. United States* 458 U.S. 279, 284 (1982) which requires the government to allege and proves:

(1) That the Defendant made a "false statement or report" or "willfully overvalued any land, property, or security," and

(2) That he did so for the purpose of influencing in any way the action of [a described financial institution] *upon any application, advance. . . . commitment, of loan.*"

The Court noted that Count I as set forth did not contain any allegations as to what the Petitioner was attempting to influence the FDIC about.

In fact, the government failed to adduce any evidence which supported what the Petitioner allegedly attempted to influence the *FDIC* about save for their introductions of Form 645.

In reversing the District Court's dismissal of Count I, the U.S. Eighth Circuit seized upon the statement "for the purpose of procuring credit from time to time, I furnish the foregoing as a true and accurate statement of my financial condition. . . ."

However, Petitioner was, of course, deprived of the chance to present evidence to the facts that:

(a) He was not seeking credit from his own bank;
(b) He filled out the standard form containing the standard language as a routine requirement to show his assets and liabilities;
(c) If done to "procure credit" the defect erred in favor of the lending institution since it *under-evaluated Petitioner's assets* by $10,000.00, i.e., the uncertain value, if any, in the Elmwood Limited Partnership.

It would appear that Petitioner was disenabled presenting refuting evidence under the 5th and 6th Amendments to the United States Constitution by failure of the government to set forth the charges and elements of 18 U.S.C. 1014 in Count 1, and thus could not and did not become able to refute the after trial, non-evidentiary supported Eighth Circuit finding that "the reference to Form 645 coupled with the charging statute, 18 U.S.C. 1014, makes it clear that Mallen's false statement was made for the purpose of influencing the FDIC in connection with a loan." Appendix A, page A-14.

Realistically, the FDIC does not pass on "loan applications," the bank's internal offices do that; thus the purpose of the Form 645 would not be to "influence the FDIC in connection with a loan," for the FDIC does not directly confront Form 645.

—o—

CONCLUSION

For each and every one of the foregoing reasons, facts, authorities and argument there encompassing, Petitioner respectfully requests that the Honorable Court grant Certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: July 6, 1988, at Santa Ana, California 92701.

Respectfully submitted,

/s/ ROGER S. HANSON
ROGER S. HANSON, ESQ.
Attorney for Petitioner
Member of the Bar
United States Supreme Court

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 87-1590
No. 87-1722

United States of America,	)	
	)	Appeal from the
	)	United States
Appellee,	)	District Court
v.	)	for the
	)	Northern District
James E. Mallen,	)	of Iowa.
	)	
Appellant.	)	

Submitted: December 14, 1987

Filed: April 4, 1988

Before JOHN R. GIBSON, BOWMAN and WOLLMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

James Mallen appeals from his conviction of failing to disclose loans "for the accommodations of others" in answering a Bank Officer's Questionnaire submitted to the Federal Deposit Insurance Corporation in violation of 18 U.S.C. § 1001 (1982). Mallen was also convicted of failing to disclose that he had an interest in certain limited partnerships in a financial statement when, in fact, he knew that he had such interests in violation of 18 U.S.C. § 1014 (1982). The district court set aside the jury's conviction on this latter count on the ground that the indictment failed to sufficiently allege a violation of the statute and the United States appeals from this ruling. Mallen

argues that there was insufficient evidence to support his conviction as his understanding of "accommodation loans" was such that his failure to disclose them was not willful. He also claimed error in the court instructions and the admission of evidence. We affirm the convictions on both counts.

In April, 1980, Lee Nikolas approached Mallen, President of the Farmers State Bank of Kanawaha, Iowa, about investing in certain real estate projects. When Nikolas could not raise sufficient capital, it was decided that Elmwood Limited Partnership (Elmwood) would be formed, with Nikolas as the general partner. Mallen, as well as Nikolas, solicited individuals to invest as limited partners in Elmwood and the Farmers State Bank made loans to a number of these investors for the purpose of investing in Elmwood. According to Elmwood's Certificate of Limited Partnership, one of the limited partnership shares was held by Nikolas, as agent. No disclosure was made that Nikolas held the share for Mallen and a partnership he formed, Mallen, et al., consisting of himself and four other directors of the Bank.

Farmers State Bank never loaned money to Elmwood directly. Instead, the bank loaned money on a number of occasions to Carl Martin, William Dahl and Robert and William Shipman, limited partners of Elmwood. After being told by Mallen that the loans were the responsibility of Elmwood, these limited partners signed bank notes in their own names. The loan proceeds were deposited in the individual partners' checking accounts and then immediately transferred to Elmwood's checking account. The notes had stated "investment" and "operating" purposes,

although the proceeds were used to pay Elmwood's operating expenses and other obligations.[1] There was evidence that Mallen devised this method of funding Elmwood's day-to-day monetary needs by making loans to the limited partners and that he prepared the loan documents.

Elmwood filed bankruptcy in December, 1982. The limited partners were sued on their notes and had judgment entered against them and they in turn filed suit against the Bank, the directors and Mallen. This led to the FDIC discovering Mallen's involvement with Elmwood and the extent of the loan transactions.

In annual 1981 and 1982 FDIC examinations, the FDIC reviewed Mallen's individual financial statements. These statements, signed in January of 1981 and 1982 and prepared by Mallen, made no reference to his personal investment in Elmwood. In addition, Question 5 of a Bank Officer's Questionnaire required Mallen to: "[l]ist all extensions of credit made since last examination for the accommodation of others than those names appear on the bank's records or on credit instruments in connection with such extensions." In response to this question, Mallen disclosed a loan to an individual for the purpose of his incorporated sand and gravel business, but made no reference to any of the loans made to the Elmwood limited

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[1]Although the bank made several loans to the Elmwood limited partners the proceeds of which went to the Elmwood partnership, the specific loans referred to in the indictment included a $50,000 loan to Carl Martin on November 13, 1981; three $110,000 loans to Dahl, Martin, and the Shipman brothers dated February 26, 1981; and a $26,500 loan to the Shipman brothers dated May 17, 1982. The first two loans had stated purposes of investment while the third left the purpose statement blank.

partners for the purpose of paying the expenses and obligations of the Elmwood partnership. The Bank Officer's Questionnaire and Mallen's individual financial statement were required filings with the FDIC for bank officers.

About two months before Mallen answered the Officer's Questionnaire, he had also failed to disclose the Elmwood partners' loans on an identical question asked by state regulators and was told that the loans should have been disclosed. Mallen previously had earlier problems with a limited partnership interest and a lending limit violation, and state regulators had fined his bank for habitual limit violations. He told others that he did not want his interest in Elmwood known to federal regulators. There was evidence that an FDIC examiner had seen a typed settlement proposal in the bank's loan file of one of the other Elmwood limited partners, Clarence Brcka. The proposal referred to the Brckas giving the bank and Mallen a hold harmless agreement relating to Elmwood matters. Later, the examiner attempted to get a copy of the typed statement, but he found only a handwritten version, which he copied. A year later the FDIC subpoened the Brckas' loan file and the bank produced a third version of this agreement which had no reference to the hold harmless agreement for Mallen. Both the second and third versions of this agreement were in Mallen's handwriting.

Count I of the indictment charged Mallen with failing to disclose his interest in Elmwood or the Mallen partnership in the financial statements filed with the FDIC. Count II charged Mallen with failing to disclose in the Officer's Questionnaire the loans made to the limited partners for the purpose of paying Elmwood's various obligations and

expenses. After a jury trial, Mallen was convicted on both counts. On its own motion, the district court set aside the conviction on Count I on the grounds that the indictment failed to sufficiently allege a violation of 18 U.S.C. § 1014.

On appeal Mallen argues that the evidence at trial was insufficient to support his conviction on Count II and that the district court erred in permitting evidence that the bank's financial condition had deteriorated and in instructing on reasonable doubt. The United States argues on cross-appeal that the district court erred in setting aside the conviction on Count I.

I.

There is apparently no dispute concerning the basic facts recited above. Instead, the factual dispute centers on whether the failure to disclose the loans to the Elmwood partners as "accommodation loans" in response to Question 5 was intentional; that is, knowing, willful and done with the intent to defraud. *See* 18 U.S.C. § 1001.

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the government and give the government the benefit of all inferences that may reasonably be drawn from the evidence. It is for the jury, not a reviewing court, to evaluate the credibility of witnesses and to weigh their testimony. *Hamling v. United States,* 418 U.S. 87, 124 (1974); *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Hudson,* 717 F.2d 1211, 1213 (8th Cir. 1983). A conviction may be based on circumstantial as well as direct evidence. *Holland v. United States,* 348 U.S. 121, 140 (1954); *Hudson,* 717 F.2d at 1213. Willfulness, intent and guilty knowledge may be

proven by circumstantial evidence alone and frequently cannot be proven in any other way. *Hudson*, 717 F.2d at 1213.

Mallen essentially maintains that he believed the loans in question were not "accommodation loans" and therefore he lacked the requisite "willful and knowing" intent to violate the statute. At trial, Mallen and Veldhouse, vice president of the bank, as well as Bruce Holmgren, an FDIC examiner, testified that the purpose of Question 5 is to advise the FDIC of who the ultimate beneficiary of a loan is so as to determine if there are any lending limit violations. Holmgren testified that lending limits are determined by adding the obligations of the borrowing customer of the bank with any obligations of others whose loan proceeds went to the borrowing customer.

Mallen and Veldhouse testified that they did not consider the loans to be accommodation loans for two reasons. First, the loans were made to individuals whose obligations were within the bank's lending limits. There was no need to add the loan amounts to the loans of Elmwood because Elmwood received no direct loans from the bank and therefore was not a "borrowing customer" of the bank. Second, Mallen and Veldhouse testified that the three $110,000 loans were sold immediately to a correspondent bank. The loans were not on the bank's books and therefore they believed the loans did not need to be included in the response to Question 5 of the Officer's Questionnaire.

However, the government introduced testimony and evidence from which the jury could have inferred that Mallen's failure to disclose the loans in response to Ques-

tion 5 was "willful and knowing." Mallen told several individuals that he did not want his interest in Elmwood known to FDIC, and there was evidence that Mallen attempted to conceal his and the bank's interest in Elmwood from the FDIC. For example, the notes which the three bank directors obtained from the bank to fund their investment in the Mallen partnership stated that the loans were obtained for "operating" rather than "investment" purposes. While Elmwood's Certificate of Limited Partnership revealed only that Nikolas held one of the limited partnership shares as "agent," he held the share "as agent" for a partnership Mallen formed, which consisted of Mallen and three other bank directors. The notes signed by the limited partners and prepared by Mallen also contained false purpose statements. None revealed that the loan proceeds were used to fund Elmwood; rather the stated purposes included such uses as "operating" or "investment." There was evidence that Mallen submitted an altered document to the FDIC in response to a subpoena issued for bank records. Mallen's personal financial statement submitted to the Bank and examined yearly by the FDIC did not reflect his interest in either the Mallen or Elmwood partnerships.

In addition to the evidence discussed above, the testimony of state bank regulators established that Mallen's failure to disclose the loans in response to Question 5 was knowing. Two months before Mallen answered the FDIC officer's Questionnaire, he had failed to disclose the loans in response to an identical question in a state examination, and state regulators informed him that he had to disclose the Elmwood-related loans. From this testimony, a jury could reasonably infer that Mallen, a bank president, knew

the loans should have been disclosed in response to the question in the Bank Officer's Questionnaire.

Finally, testimony established a motive for Mallen's failure to disclose the loans. In 1979, Mallen was cited by the state for overextending his own line of credit because of his involvement in another limited partnership. In 1980, the Bank was fined for "continued and habitual violations of the lending statutes."

Our review of the record convinces us that there was substantial evidence supporting the jury's finding that Mallen willfully and knowingly concealed material facts in the officer's Questionnaire submitted to the FDIC in violation of 18 U.S.C. § 1001.

For similar reasons we reject Mallen's contention that Question 5 was ambiguous and therefore his response to the question cannot be willful and knowing. Mallen maintains that the term "accommodation loan" is ambiguous. Consequently, he argues that the government had the burden of negating the claim that he, in good faith, misunderstood the question. He argues that since the government failed to prove the meaning of the term "accommodation loan" it failed to meet its burden of proof and his conviction must be set aside. *See United States v. Steinhilber*, 484 F.2d 386, 389 (8th Cir. 1973). However, Question 5 does not use the term "accommodation loan"; instead it asks for a disclosure of "[all loans] made • • • for the accommodation of others than those whose names appear on the bank records or credit instruments." We are satisfied this question is not ambiguous. The response called for by Question 5 was an issue for the jury to resolve. Mallen testified about why he answered Question 5 as he

did and the jury was instructed that the government must prove, beyond a reasonable doubt, that Mallen knowingly and willfully made a false statement. Although the evidence did not eliminate every possibility inconsistent with guilt, there was substantial testimony from which the jury could properly conclude that Mallen, a bank president, knew the loans should have been reported in response to Question 5 and that his failure to disclose the loans was willful.

II.

Mallen also contends that the district court improperly admitted testimony that the Elmwood loans adversely affected the Bank's rating. Mallen argues that the court erred in admitting this testimony because it was not relevant, Fed. R. Evid. 402, or, if relevant, its probative value was outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

The admissibility of evidence is primarily a determination to be made by the district court, *United States v. Jones*, 687 F.2d 1265, 1267 (8th Cir. 1982), and this court will not substitute its judgment unless there has been an abuse of discretion. *United States v. Abodeely*, 801 F.2d 1260 (8th Cir. 1986).

In order to obtain a conviction for making a false statement under 26 U.S.C. § 1001,[2] the government must

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[2]18 U.S.C. §1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or

(Continued on following page)

prove, among other things, the statement's materiality. *See United States v. Hicks,* 619 F.2d 752, 754 (8th Cir. 1980). To establish the materiality of a false statement the government must show that the statement had the capability of influencing the agency's exercise of its governmental function. *United States v. Richmond,* 700 F.2d 1183, 1188 (8th Cir. 1983). Testimony established that one of the functions of the FDIC is to ensure the soundness of banks. In order to monitor the condition of banks the FDIC has developed a rating system designed to reflect the overall condition of a bank and to determine risk to deposits, the need for supervision and the need to take action to correct problems. Thus, the testimony that the undisclosed loan transactions adversely affected the Bank's rating and that the condition of the Bank had deteriorated was plainly relevant to whether the alleged false statement had the capability to influence the FDIC's function. We conclude therefore this testimony was relevant to the issue of materiality and therefore properly admitted by the district court.

Mallen also maintains that due to Iowa's poor economy and the number of bank failures, the testimony that an Iowa bank suffered a decline in its financial condition is an emotional issue which the government offered only to appeal to the jury's emotions. To exclude relevant evidence, Fed. R. Evid. 403 requires that the probative value

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(Continued from previous page)

fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

be substantially outweighed by the danger of unfair prejudice. The district court closely scrutinized the challenged evidence in a side-bar conference out of the presence of the jury. The court permitted only the evidence that, in general, the rating of the bank deteriorated and did not permit testimony of the specific decline in rating or the testimony that the numerical rating declined to a showing of "5," or "likely imminent failure." Thus, we cannot say the court abused its discretion in admitting this testimony.

Finally, Mallen contends that the district court erred in instructing the jury as to reasonable doubt. Mallen requested an instruction on reasonable doubt orally, rather than in writing as required by Fed. R. Crim. P. 30. Despite the absence of a writing, the record indicates that the district court was adequately informed of Mallen's request and we will therefore consider it on appeal. *See United States v. Krapp,* 815 F.2d 1183, 1186-87 (8th Cir. 1987). Nevertheless, we may dismiss this argument summarily, as the instruction given by the district court was taken from the Eighth Circuit's Model Criminal Jury Instructions § 3.11 (1985) (revised 1986) and the instruction has been specifically upheld by this court. *See United States v. Risken,* 788 F.2d 1361, 1371 (8th Cir. 1986).

III

The district court, on its own motion, set aside the jury's conviction on Count I, concluding that the indictment failed to allege an essential element of section 1014

and was therefore defective.[3] Count I of the indictment charged that Mallen knowingly made:

> a materially false statement in an Individual Financial Statement, Form No. 645, submitted * * * to the Farmers State Bank, Kanawha, Iowa, a bank insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of the Federal Deposit Insurance Corporation, in that James E. Mallen did not disclose in the statement that he had a financial interest in Mallen Et Al. or Elmwood Limited Partnership when, in truth and fact, as James E. Mallen well knew, he did have interests in such businesses.
>
> This is in violation of 18 U.S.C. § 1014.

In setting aside the conviction, the court determined that there was no allegation that the action influenced related to an "application, advance, discount, purchase, repurchase agreement, commitment, or loan [etc.] as required by section 1014." *Williams v. United States*, 458 U.S. 279, 284 (1982).

An indictment is sufficient if it fairly informs the accused of the charges against him and allows him to plead

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[3] 18 U.S.C. § 1014 provides:

> Whoever knowingly makes any false statement or report * * * for the purpose of influencing in any way the action of [certain enumerated financial institutions, among them banks whose deposits are insured by the Federal Deposit Insurance Corporation and the Federal Deposit Insurance Corporation itself] *upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment or loan or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor,* shall be fined not more than $5000 or imprisoned not more than 2 years, or both. (Emphasis added.)

double jeopardy as a bar to a future prosecution. *Hamling,* 418 U.S. at 117; *United States v. Helmel,* 769 F.2d 1306, 1322 (8th Cir. 1985). It is not necessary that the indictment use the precise language used in the statute, as long as the indictment, by fair implication, alleges an offense recognized by the law. *See Hamling,* 418 U.S. at 117-18; *United States v. Joseph,* 781 F.2d 549, 554 (6th Cir. 1986). An indictment is fatally insufficient when an essential element "of substance" is omitted, rather than one "of form" only. To determine whether an essential element has been omitted, a court may not insist that a particular word or phrase appear in the indictment when the element is alleged "in a form" which substantially states the element. *United States v. Czeck,* 671 F.2d 1195, 1197 (8th Cir. 1982); *United States v. Camp,* 541 F.2d 737, 739-40 (8th Cir. 1976). Although the sufficiency of an indictment is a jurisdictional issue which may be considered at any time, Fed. R. Crim. P. 12(b)(2), when an indictment is challenged for the first time after a verdict, it will be liberally construed in favor of sufficiency. *Joseph,* 781 F.2d at 554. There will be no reversal absent prejudice unless the indictment cannot, within reason, be construed to charge a crime. *Joseph,* 781 F.2d at 554.

It is true that the indictment does not expressly state that the false statement was made to influence the FDIC action in connection with a loan or upon any other transaction specified in 18 U.S.C. § 1014. However, the indictment refers to Form 645, Mallen's Individual Financial Statement, which states, "*For the purpose of procuring credit from time to time,* I furnish the foregoing as a true and accurate statement of my financial condition . . ."

(emphasis added). The reference to Form 645, coupled with the citation to the charging statute, 18 U.S.C. § 1014, makes it clear that Mallen's false statement was made for the purpose of influencing the FDIC in connection with a loan. *See Czeck,* 671 F.2d at 1197 (the term "Special Agent" coupled with the citation to the federal statute makes it clear that a federal officer was assaulted in performance of his duties); *cf. United States v. Camp,* 541 F.2d at 740-41 (mere citation to the charging statute is insufficient to supply a missing element of an offense). Although the indictment might have been more complete in alleging the type of transaction in which Mallen attempted to influence the actions of the FDIC, it fairly put Mallen on notice of the charge against him. The indictment was sufficient to allow Mallen to prepare his defense and to plead double jeopardy to any future prosecution. We conclude that Count I of the indictment was sufficient.

We remand with instructions that Mallen's conviction on Count I be reinstated, and Mallen be sentenced on that count. We affirm the conviction on Count II.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1590/1722-NI

United States of America,	)	
Appellee,	)	Appeals from the United States
vs.	)	District Court for the Northern
James E. Mallen,	)	District of Iowa
Appellant.	)	

Petition for rehearing en banc filed by appellant/cross-appellee, James E. Mallen, has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

May 10, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals,
Eighth Circuit

APPENDIX C

18 USC

§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, any bank the deposits of which are insured by the Federal Deposit Insurance Corporation, any member of the Federal Home Loan Bank System, the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the Administrator of the National Credit Union Administration, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment,

or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

APPENDIX D

INDICTMENT

"The Grand Jury charges: Count 1. On or about January 15, 1982, in the Northern District of Iowa, James E. Mallen knowingly did make a materially false statement in an Individual Financial Statement, Form No. 645 submitted by James E. Mallen on that date to the Farmers State Bank, Kanawha, Iowa, a bank insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of the Federal Deposit Insurance Corporation, in that James E. Mallen did not disclose in the statement that he had a financial interest in Mallen Et. Al. or Elmwood Limited Partnership when, in truth and fact, as James E. Mallen well knew, he did have interests in such businesses.

"This in violation of 18 United States Code Section 1014.

"Count 2. On or about November 22, 1982, in the Northern District of Iowa, James E. Mallen, in a matter within the jurisdiction of the Federal Deposit Insurance Corporation of the United States, willfully and knowingly did falsify, conceal, and cover up by trick, scheme or device a material fact, and did make a materially false, fictitious or fraudulent statement or representation, and did make and use a false writing or document knowing the same to contain a materially false, fictitious or fraudulent statement or entry, in that in an Officer's Questionnaire, No. 13152-1, Form FDIC 6300/34 (6-82) Defendant did not disclose an accommodation loan in the name of Carl Martin, dated November 13, 1981; accommodation loans in the

name of William Dahl, Carl Martin and Robert and William Shipman, dated February 26, 1982; an accommodation loan in the name of Robert and William Shipman, dated May 17, 1982, all made by the Farmers State Bank, Kanawha, Iowa, when in fact such accommodation loans had been made.

"This is in violation of 18 United States Code Section 1001."

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	
	)	NO. CR 86-3017
Plaintiff,	)	
	)	ORDER
vs.	)	
	)	(Filed April 22,
JAMES E. MALLEN,	)	1987)
	)	
Defendant.	)	

This matter is before the court on the court's own motion in preparing for defendant's sentencing hearing scheduled for May 1, 1987.

From its review of the file, the court detects a potential issue concerning the sufficiency of Count 1 of the Indictment. Failure of an indictment to state an offense is a jurisdictional issue which may be considered at any time. *See United States v. Broucheau*, 597 F.2d 1260, 1262, n. 1 (9th Cir. 1979). Defects in jurisdiction cannot be ignored, *United States v. Anderson*, 464 F.2d 1390, 1392 (D.C. Cir. 1972), and may be raised by the court sua sponte, *Home Federal S & L Ass'n v. Ins. Dept. of Iowa*, 571 F.2d 423, 425, n. 12 (8th Cir. 1978). Objections based on defects in the indictment for failure to charge an offense shall be noticed by the court at any time during the pendency of the proceedings, Fed. R. Cr. P. 12(b)(2), even though the matter was not raised by the parties. *See*, Fed. R. Cr. P. 52(b); *United States v. Clark*, 412 F.2d 885,

888 (5th Cir. 1969); *Chappell v. United States*, 270 F.2d 274, 276 (9th Cir. 1959).

Count 1 of the Indictment alleges that the defendant committed a criminal offense by violating 18 U.S.C. § 1014. Section 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the . . . Federal Deposit Insurance Corporation . . . *upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor*, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

(Emphasis added.)

In discussing § 1014, the Supreme Court stated:

> To obtain a conviction under § 1014, the Government must establish two propositions: it must demonstrate (1) that the defendant made a "false statement or report," or "willfully overvalue[d] any land, property or security," and (2) that he did so "for the purpose of influencing in any way the action of [a described financial institutional] *upon any application, advance, . . . commitment, or loan.*"

Williams v. United States, 458 U.S. 279, 284 (1982) (emphasis added). Similarly, other cases have indicated that a necessary part of the elements under § 1014 involves influencing a financial institution concerning a loan or one of the other transactions listed in the statute. *See, e.g., United States v. Erskin*, 588 F.2d 721, 722 (9th Cir. 1978); *United States v. Cerrito*, 612 F.2d 588 (1st Cir. 1979); and

United States v. Stephens, 779 F.2d 232, 241-242 (5th Cir. 1985).

In contrast, Count 1 of the Indictment provides:

> On or about January 15, 1982, in the Northern District of Iowa, JAMES E. MALLEN knowingly did make a materially false statement in an Individual Financial Statement, Form No. 645 submitted by JAMES E. MALLEN on that date to the Farmers State Bank, Kanawha, Iowa, a bank insured by the Federal Deposit Insurance Corporation, for the purpose of influencing the action of the Federal Deposit Insurance Corporation, in that JAMES E. MALLEN did not disclose in the statement that he had a financial interest in Mallen Et. Al. or Elmwood Limited Partnership when, in truth and fact, as JAMES E. MALLEN well knew, he did have interests in such businesses.
>
> This in violation of 18 U.S.C. § 1014.

Count 1 does not appear to contain any allegation concerning upon what, if anything (a loan or one of the other transactions listed in § 1014), the defendant was attempting to influence the FDIC's action.

ORDER:

Accordingly, It Is Ordered:

1. The parties shall file by April 28, 1987, written briefs upon the issue of whether Count 1 of the Indictment sufficiently charges an offense under 18 U.S.C. § 1014.

Done and Ordered this 22nd day of April, 1987.

/s/ David R. Hansen
David R. Hansen, Judge
UNITED STATES
DISTRICT COURT

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